



CITY OF PETALUMA

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PETALUMA, CA 94952

Kevin McDonnell
Mayor

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September 7, 2023

Via Email and First Class Mail

Nor-Cal Pump & Well Drilling, Inc
1325 Barry Road
Yuba City, CA 95993

Re: Response to Nor-Cal Pump & Well Drilling, Inc's Protest Letter for Oak Hill Municipal Well Project, Project #: C67501611

Dear Nar Heer,

On August 24, 2023, the City of Petaluma ("City") received a letter from you on behalf of Nor-Cal Pump & Well Drilling, Inc. ("Nor Cal"), the third lowest bidder, protesting the bids submitted by Well Industries Incorporated's (WII) bid, the apparent low bidder and WildRose Drilling LLC DBA WildHeron Drilling (WildRose), the apparent second low bidder for the contract to construct the Oak Hill Municipal Well Project ("the Project"). Following review and analysis of the protest and consultation with the City of Petaluma Public Works staff, I have determined that your protest lacks merit for the reasons stated below. Therefore, I will recommend that the City Council reject Nor Cal's bid protest and award the contract for the Project to WII as the lowest responsible, responsive bidder.

I. LEGAL STANDARDS

California Public Contract Code section 20162, which governs the City's award of the contract for this Project, requires that the contract be awarded, if at all, to the lowest responsible bidder. In Section 18 of the Notice Inviting Bids document: the City expressly reserves its rights to evaluate bid compliance and to waive minor bidding errors:

"The City reserves the right to reject any or all bids, to waive any minor irregularity in a bid, and to make awards to the lowest responsive, responsible bidder as it may best serve the interest of the City."

The City's discretion to waive inconsequential informalities or irregularities is well established under California law, "[I]t is further well-established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential." (*Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1188 ("Bay Cities").)

A bid is responsive if it promises to do what the bidding instructions demand. (*Williams v Clovis Unified Sch. Dist.* (2007) 146 CA4th 757; *Valley Crest Landscape Inc. v City Council* (1996) 41 CA4th 1432, 1438.) In general, issues of responsiveness are determined by looking exclusively at the face of the bid. (*Great West Contractors, Inc. v. Irvine Unif. Sch. Dist.* (2010) 187 Cal.App.4th 1425, 1453. ("Great West")) Therefore, allegations that go beyond the face of the bid are generally not relevant for determining responsiveness. In addition, allegations of non-responsiveness must be evaluated from a practical, rather than speculative or hyper-technical perspective, and based on the public interest:

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“They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal...of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.” (*Bay Cities*, supra, at 1189; internal quotation marks omitted.)

Accordingly, the City may waive deviations from the bidding documents if the deviations are non-material. Materiality is determined if the deviation causes an advantage to the contractor that deviated or disadvantages the other bidders. From this legal framework, we consider Nor Cal’s allegations.

II. ANALYSIS

1. Nor Cal Alleges that Well Industries Incorporated is not Responsible

Nor Cal’s bid protest letter alleges that “WII lacks the experience to perform the project” as WII “only listed their experience drilling wells in Arizona for peacock Nuts... and they did not include the project size and length which were required to submit....” However, the City deems WII to be responsible.

“A bidder is responsible if it can perform the contract as promised.” (*Taylor Bus Serv., Inc. v. San Diego Bd. of Educ.*, 195 Cal. App. 3d 1331, 1341 (1987)). More specifically, responsibility “includes the attribute of trustworthiness, [but] also has reference to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work.” (*City of Inglewood-Los Angeles County Civic Center Auth. v. Superior Court*, 7 Cal.3d 861, 867 (1972); see also Pub. Cont. Code § 1103 (similarly defining responsibility)). Factors for determining whether a bidder is responsible include experience in performing a similar contract; sufficient bonding capacity; do they have the required licenses; and whether the bidder’s past actions that demonstrate a lack of trustworthiness.

The purpose of the Statement of Qualifications (SOQ) is to demonstrate the contractor’s experience in performing projects similar to the Project and prove they can perform the work. The SOQ requires the contractor to demonstrate that the company has five years of experience engaged in the performed of similar work, experience with public works projects, and completion of two projects of similar well work of at least \$100,000. In WII’s SOQ, they listed projects from 2008 to 2023 showing multiple public works well drilling projects ranging from \$101,000 to \$618,000. Additionally, City staff contacted the awarding bodies for work that WII performed, who attested to satisfactory quality and completion of projects. Moreover, WII maintains all the required licenses to perform the project. This demonstrates WII’s ability to perform the Project work, and therefore WII is found to be responsible.

2. Unnotarized Site Visit Affidavit

Second, Nor Cal states that “WII did not notarize the site visit affidavit...” which was a requirement of the Site Visit Affidavit. The main purpose of notarizing documents is to ensure proper execution and to deter fraud. However, the Site Visit Affidavit does not bind the signer and its purpose is to ensure that a contractor has visited the location of the Project and can ask questions related to location. While the document was not notarized it was signed by a representative of WII. Whether or not WII Notarized the Site Visit Affidavit does not provide WII an advantage nor is there any evidence that this disadvantaged any of the other bidders. Moreover, WII’s bid document was notarized in the bonding section.

3. Failure to submit Statement of Qualifications within 24 hours

Third, Nor Cal protests WII's failure to submit the Statement of Qualifications within 24 hours of the bid opening which was a requirement on the Statement of Qualifications. However, the Statement of Qualifications only required, "The apparent low Bidder shall submit a Statement of Qualifications as specified herein as a submittal to the City within 24 hours of the bid opening." Not providing this information timely is not a material deviation because it was only a requirement on the low bidder and not the other bidders, and therefore it could not have benefited WII or prejudiced the other bidders. Additionally, whether the Statement of Qualifications was submitted timely goes outside the face of the bid packet.

III. CONCLUSION

Based upon the foregoing, it is City staff's determination that WII is the lowest responsible bidder. I will recommend that the City Council reject Nor Cal's bid protest in its entirety as lacking merit and waive any irregularities in WII's bid. City staff intends to recommend that the Council then award the contract for the Project to WII at its September 18, 2023, City Council meeting. The City appreciates your interest in this project and wishes you success with your next project.

Sincerely,

Dylan Brady

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